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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FREDRICK GARTRELL NEWBERRY, Defendant and Appellant.	E035199 (Super.Ct.No. FWV025711) OPINION

APPEAL from the Superior Court of San Bernardino County. Paul M. Bryant, Jr., Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Deputy Senior Assistant Attorney General, and Robert M. Foster, Supervising Deputy Attorney General, for Plaintiff and Respondent.

In a felony complaint filed on July 18, 2002, defendant Fredrick Gartrell Newberry was charged with attempted unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a) & Pen. Code, § 664), second degree burglary of a vehicle (Pen. Code, § 459), receiving stolen property (Pen. Code, § 496, subd. (a)), and possession of a deadly weapon (Pen Code, § 12020, subd. (a)(1)). On August 6, 2003, pursuant to a plea bargain, defendant who was represented by counsel, pled guilty to receiving stolen property. As agreed, pronouncement of judgment was withheld and defendant was placed on 36 months of supervised probation on the condition that he spend 180 days in jail. The remaining counts were dismissed.

On September 27, 2003, defendant was arrested on new charges. On October 14, a preliminary hearing was conducted and defendant was bound over for trial on the new charges in case number FWV029172. On that same date, his probation in this case was revoked. On December 22, following a probation violation hearing, the trial court found defendant to be in violation of the condition that he violate no law. Specifically, he had hit the victim and threatened to kill her. Defendant was sentenced to the aggravated term of three years, with credit for 250 days (167 days actual credit, plus 83 days of good conduct credit), to run concurrent with a two-year sentence imposed in FVI015401.

Defendant appeals contending the admission of the hearsay statements of the only percipient witness, absent a showing of good cause, violated his constitutional right to due process of law.

FACTS

At the probation revocation hearing, Officer Thomas O'Dell testified that on September 27, 2003, shortly after 6:00 p.m., he responded to a call on I-15 Freeway, south of Jurupa. Upon his arrival, O'Dell interviewed a female, referred to as "Jane Doe." On the left side of her face, she had a bruised, blackened eye, and her face was swollen and red. She had a bandage on her ankle. O'Dell retrieved a knife outside a vehicle, near the passenger door. He observed that Jane Doe's clothes were dirty and greasy.

O'Dell interviewed defendant who stated that Jane Doe was injured because she fell down, more than once, due to being intoxicated. During his contact with Jane Doe, O'Dell did not observe any signs of intoxication.

Over defense objections on the ground of hearsay, O'Dell testified as to what Jane Doe had told him as to how she had received her injuries. She said that defendant hit her in the face with his fist, threatened to kill her with a knife, and dragged her when she tried to get away, thus injuring her foot. O'Dell examined defendant's fists for bruising or swelling with negative results.

In his defense, defendant testified that he was driving on the freeway with a friend when they had a flat tire. They pulled over to the side of the road. Because the road had a pebbled surface and Jane Doe was wearing high heels, she slipped and fell. Defendant heard her say, "'My ankle.'" He helped her into the car and went back to change the tire.

A car stopped about 30 yards away and Jane Doe went to the car. Fifteen minutes later, the police arrived.

ADMISSION OF JANE DOE'S STATEMENTS TO O'DELL

Relying on our Supreme Court's recent decision in *Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*), defendant argues that "O'Dell's questioning of Jane Doe for the purpose of investigation and gathering evidence against [him] falls within the same testimonial category" of statements which are inadmissible pursuant to the confrontation clause. We disagree.[1]

On July 15, 2004, this court issued its analysis of the *Crawford* decision. (*People v. Cage* (July 15, 2004, E034242) ____ Cal.App.4th ____ [2004 D.A.R. 8563] (*Cage*).) As we noted, "[b]efore *Crawford*, if hearsay was admissible, as a matter of state law, under a 'firmly rooted hearsay exception,' it was admissible under the confrontation clause. Even if not, it was admissible under the confrontation clause as long as it was accompanied by 'particularized guarantees of trustworthiness' (also known as 'indicia of reliability'). (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 [100 S.Ct. 2531, 65 L.Ed.2d 597] (*Roberts*).)" (*Cage*, *supra*, ____ Cal.App.4th ____ [2004 D.A.R. at p. 8566].) However, in *Crawford*, our highest court "overruled *Roberts*, at least to the extent that it 'condition[ed] the admissibility of all hearsay evidence on whether it falls under a "firmly

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[1] We reject respondent's claim that defendant has waived this issue. "Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect

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rooted hearsay exception" or bears "particularized guarantees of trustworthiness." [Citation.]' (*Crawford*, *supra*, 124 S.Ct. at p. 1369; see also *id*. at pp. 1370-1374.) I[nstead, *Crawford*] found this 'framework . . . so unpredictable that it fails to provide meaningful protection from even core confrontation violations.' (*Id*. at p. 1371.) It also condemned *Roberts* because '[i]t applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause.' (*Crawford*, at p. 1369.)

"The court admitted that the history of the clause 'suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.' (*Crawford*, *supra*, 124 S.Ct. at p. 1364.) 'Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . , as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.' (*Id*. at p. 1374.) The court confessed that its analysis 'casts doubt' on whether the confrontation clause applies to nontestimonial hearsay at all. (*Id.* at p. 1370.) Nevertheless, it declined to resolve that question. (*Ibid*.)" (*Cage*, *supra*, ____ Cal.App.4th ____ [2004 D.A.R. at p. 8567].)

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trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50
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In *Cage*, we were asked to determine whether a victim's three successive hearsay statements (to a police officer at the hospital, to a doctor at the hospital, and to the same police officer at the police station) were inadmissible under the confrontation clause within the meaning of *Crawford*. (*People v. Cage*, *supra*, ____ Cal.App.4th ____ [2004 D.A.R. 8563, 8566].) Given the three separate hearsay statements, we find Jane Doe's statement to O'Dell more analogous to the *Cage* victim's statement to the police officer at the hospital. For the reasons expressed in *Cage*, we thus conclude that Jane Doe's statement was not testimonial within the meaning of *Crawford*.

As we noted in *Cage*, "*Crawford* strongly suggested that a hearsay statement is not testimonial unless it is made in a relatively formal proceeding that contemplates a future trial. The court relied on the 19th-century definition of testimony as '"'[a] *solemn* declaration or affirmation made for the purpose of establishing or proving some fact."' (*Crawford*, *supra*, 124 S.Ct. at p. 1364, italics added.)" (*People v. Cage*, *supra*, ____ Cal.App.4th ____ [2004 D.A.R. at p. 8568].) Under *Crawford*, the usual meaning of testimonial is extended to include statements made in response to police interrogation which *Crawford* considers to be the modern equivalent of a pretrial examination before a justice of the peace. (*Cage, supra,* ____ Cal.App.4th ____ [2004 D.A.R. at p. 8568].) However, "[t]he Marian bail and committal statutes . . . did not kick in until an accused had been arrested and brought before the justice of the peace. . . . At that point, 'there

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Cal.3d 668, 703.) Defense counsel could not have been expected to foresee *Crawford*.

was an accusation definitely formulated against some specific person . . . .' [Citation.] Moreover, these statutes required the justice of the peace to 'put [the examination] in writing' and to 'certify' it . . . i.e., they required official recordation of the proceedings. Indeed, that was what precisely made it possible for the preliminary examination to be used at trial, much to the framers' vexation." (*Id.* at p. 8568.)

Here, like in *Cage*, we cannot find that the framers would have seen a "striking resemblance" between O'Dell's interview with Jane Doe on the side of the freeway and a justice of the peace's pretrial examination. Absent in this case is the particular formality. O'Dell was merely trying to discover whether a crime had been committed. No one was under arrest. No trial was contemplated. And, there was no structured questioning. Instead, both Jane Doe and defendant were invited to tell their story of what had happened. "Police questioning is not necessarily police interrogation. When people refer to a 'police interrogation,' however colloquially, they have in mind something far more formal and focused." (*People v. Cage*, *supra*, ____ Cal.App.4th ____ [2004 D.A.R. at p. 8568].)

For the above reasons, we conclude that Jane Doe's hearsay statement to O'Dell was not testimonial within the meaning of *Crawford*. Assuming nontestimonial hearsay still must be admitted under a firmly rooted exception (or accompanied by indicia of reliability), Jane Doe's hearsay statement was admissible under Evidence Code section 1240. Accordingly, its admission did not violate the confrontation clause.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

WARD
J.

GAUT
J.